Made in France, Inc. *and* Warehouse Union Local 6, International Longshore & Warehouse Union, AFL–CIO. Cases 20–CA–29112, 20–CA–29216–1, and 20–RC–17522

October 29, 2001

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On April 7, 2000, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions, a supporting brief, a reply brief, and an answering brief. The Respondent filed cross-exceptions[1] and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Made in France, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Locking the warehouse gate without justification in response to the Union's request for recognition.

(b) Discharging employees for supporting and engaging in activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at the Respondent's place of business the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 4, 1999.

(b) Within 14 days from the date of this Order, offer Joseph O'Neil full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Joseph O'Neil whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Joseph O'Neil and within 3 days thereafter notify him in writing that this has been done and that his discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

[1] Chairman Hurtgen notes that the Respondent did not except to the judge's findings that the Respondent violated Sec. 8(a)(1) and (3) of the National Labor Relations Act. In addition, Chairman Hurtgen notes that three of the Respondent's exceptions relate to certain of the judge's evidentiary rulings. The Respondent prevailed on the substantive issues to which the evidentiary rulings related. Therefore, Chairman Hurtgen finds it unnecessary to pass on these rulings.

The Respondent raised an estoppel defense to the Union's election objections and to the General Counsel's seeking of a *Gissel* remedy. The defense is that the Union (1) told employees about other employers who had in the past contacted the Immigration & Naturalization Service (INS) to raid employees before elections and (2) warned the employees about employers' use of consultants and tactics the Respondent might use in the election. We reject the defense. Even if this union conduct were objectionable or unlawful, that would not minimize the Respondent's conduct which upset laboratory conditions and which made unlikely the prospect of having a free and fair election.

[2] Members Liebman and Walsh, however, do not adopt the judge's comments in fn. 30 of his decision. The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container*, 325 NLRB 17 (1997). We will also modify the judge's Order to conform to our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on June 11, 1999, in Case 20–RC–17522, is set aside, and this case is remanded to the Regional Director for Region 20 to conduct a new election at a time and place determined by him.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT lock the warehouse gate without justification in response to employees' union activity.

WE WILL NOT discharge employees because of their interest in or activities on behalf of any union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer employee Joseph O'Neil full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph O'Neil whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joseph O'Neil, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MADE IN FRANCE, INC.

Paula R. Katz, Esq. and *Boren Chertkov, Esq*., for the General Counsel.

Richard Lotts, Esq. (Sheppard, Mullin, Richter & Hampton, LLP), of Los Angeles, California, for the Respondent.

Beth A. Ross, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in San Francisco, California, on September 22–24 and October 4–7, 19, 21, and 22, 1999. The original charge in Case 20–CA–29112 was filed by Warehouse Union Local 6, International Longshore & Warehouse Union, AFL–CIO (the Union) on May 7, 1999. The original charge in Case 20–CA–29216 was filed by the Union on July 1, 1999. Thereafter, on August 30, 1999, an order consolidating cases, consolidated complaint and notice of hearing was issued by the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) alleging violations by Made in France, Inc. (the Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent, in its answers to the complaint and amended complaint, duly filed, denies that it has violated the Act as alleged.

On May 7, 1999, the Union (or Petitioner) filed a petition for election in Case 20–RC–17522. The parties entered into a Stipulated Election Agreement approved on May 21, 1999. Following an election held on June 11, 1999, a tally of ballots was issued showing that of approximately 14 eligible voters, 3 votes were case in favor of the Petitioner, 10 votes were cast against the Petitioner, 1 ballot was challenged, and 1 ballot was void. Thereafter, the Petitioner filed timely objections to the election and on September 3, 1999, the Acting Regional Director issued a report on objections, order consolidating cases, and notice of hearing, in which the unfair labor practice proceedings were consolidated with the representation proceeding to the extent that the unfair labor practice allegations bear on the validity of the election, and requested that the administrative law judge prepare and cause to be served upon the parties a report containing credibility resolutions, findings of fact and recommendations to the Board as to the disposition of the objections and unfair labor practices bearing on the validity of the election.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent, and counsel for the Union. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation with offices and warehouses in San Francisco, California, is engaged in the business of importing and distributing specialty foods and French wines. In the course and conduct of its business operations, the Respondent annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of California. It is admitted and I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES; ELECTION OBJECTIONS

A. The Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employees and by other conduct, and whether a bargaining order should be imposed to remedy the alleged violations; or whether the Union's election objections, incorporating the alleged unfair labor practices and other objections, should be found to be meritorious.

B. The Facts

1. The alleged unfair labor practices

a. The request for recognition

On May 4, 1999,[1] a group comprised of five union representatives and five employees[2] assembled outside the Respondent's premises. Business Agent Fred Pecker handed two letters to the Respondent's operations manager, Patrick Maury, both dated May 4. One letter requests voluntary recognition in a unit of the Respondent's drivers and warehouse employees, premised on the representation that the Union has been designated by "an overwhelming majority" of the unit employees as their bargaining representative.[3] The letter warns the Respondent about the rights of employees to engage in union activities, as follows:

> We would also like to advise you at this time that federal and state labor laws protect the right of employees to participate in union activities and to be represented by the union of their choice. Any form of employer conduct which interferes with, restrains or coerces the above-named employees, or any other Made in France employees, in the exercise of these protected rights is unlawful. We therefore request that you immediately instruct all of your supervisory and managerial personnel to refrain from any threats, intimidation, coercive interrogation regarding union activities, surveillance of union activities, or other such unlawful conduc t.

The second letter contains a similar warning and a list of employees who "are member of the Made In France Organizing Committee." The list contains the names of 11 of the approximately 15 unit employees, consisting of 7 drivers and 8 warehouse employees, including the names of Joseph O'Neil and Pam Nixon, and states that the named employees "will be wearing photo ID badges indicating their support for the Union."[4]

During the meeting the union representatives made certain statements to Maury, demanded recognition, and warned Maury about taking any adverse action against employees that would violate the law. Maury thanked them and said he would pass the letters and information on. The only employee to speak during this meeting was Joseph O'Neil, a warehouse employee, who said that he just wanted to tell Maury that if he had "anything to say to me from now on, these are my representatives and talk to them."

On May 7, the Union filed a representation petition in Case 20–RC–17522. An election was held on June 11. Three votes were cast for the Union, 10 votes were cast against the Union, 1 ballot was void, and 1 ballot, namely the ballot of employee O'Neil, who had been discharged prior to the election, was challenged. As noted above, the Union filed objections to the election, which have been referred to me in this consolidated proceeding.

b. The discharge of Joseph O'Neil

Joseph O'Neil, a warehouse employee, was hired in April 1998. Sometime in January, at his request so that he could attend school in the afternoon, O'Neil was assigned to the 6 a.m. shift. On this early shift he was the only warehouseman present. He was responsible for filling customers' orders and preparing them for the truckdrivers, particularly the orders that had been called or faxed in after the close of business on the preceding day. The truckdrivers, who also arrive at 6 a.m., are required to promptly leave on their routes as soon as the trucks are loaded with the merchandise. The other warehousemen did not report to work until 9 a.m. or later. Warehouse Manager Benoit Dubuisson testified as follows regarding O'Neil's 6 a.m. shift:

> [T]he 6:00 a.m. shift is very important. If he's later, I mean the drivers (sic) has to do the orders, and that's going to make the drivers late, customers not happy, and I mean its just one thing. It's like a, if a person is late in the morning, should come in at 9:00, it's not such a big deal to being late. But that person [O'Neil] requested to me, because he wanted to go

[1] All dates or time periods hereinafter are within 1999 unless otherwise specified.

[2] Three of the five employees clocked out that morning for a short time in order to be present and show their support for the Union, namely, Patricia (Pam) Martin-Nixon (Nixon), Joseph O'Neil, and Erik Cole; the two other employees who were present, Ivan Castro and Lamar Legaspi, were not scheduled to work at that time.

[3] The evidence shows and I find that approximately 11 of the 15 unit employees had signed valid union authorization cards prior to May 4.

[4] Abundant record evidence shows that in fact the employees only wore the badges for a day or so after May 4; the Respondent maintains that this constitutes evidence that the employees almost immediately lost interest in union representation, and that early employee defection from the Union was not the result of any subsequent conduct of the Respondent.

> back to school, and he knew that his attendance was very, it was a must to be able to serve our customers.

Dubuisson testified that O'Neil's attendance was always a problem, but that it had improved in October, November, and December 1998, and apparently the first part of January, a period of time when the Respondent was particularly busy. During this time O'Neil did a good job, and there was never a problem with O'Neil's work performance after he clocked in. Therefore, Dubuisson granted O'Neil's request to transfer to the 6 a.m. shift sometime in January, so that he could attend school, with the understanding that he was to be sure that he was at work on time. O'Neil gave his assurance, and Dubuisson trusted him. However, after this transfer Dubuisson continued to have a lot of problems with O'Neil's attendance, and verbally admonished him for his lackadaisical attitude toward attendance and punctuality. In addition, coworkers complained to Dubuisson about O'Neil's attendance and tardiness.

On January 14, Dubuisson gave O'Neil his annual appraisal. Dubuisson checked the boxes reflecting that O'Neil fulfilled the requirements for attendance and punctuality, and checked the box opposite the statement. "Constantly accomplishes the requirements of the job. This means that employee's performance is better than 'average.'" Dubuisson testified that in fact this was not correct as O'Neil's attendance and tardiness was still a problem, but that

> I did show him some respects [sic] because of his good work and good behavior for the three months that he was working. And everybody had mentioned the change of his behavior during those three months. So I didn't want to give him a bad review just for that, because on the other side, he did a very good job under the pressure, and produced a tremendous amount of work during those three months that we were very busy. So I didn't want to say anything against that.

In this appraisal Dubuisson was rating O'Neil for the entire year. Dubuisson testified that O'Neil's attendance and punctuality was not as important prior to January, when he was on the 9 a.m. shift and working along with other warehouse employees who were available to do the work, and that this consideration, coupled with the fact that O'Neil worked particularly hard during the last 3 months of 1998,[5] influenced Dubuisson's decision to refrain from downgrading him for attendance and punctuality during his annual appraisal.[6]

Patrick Maury, formerly the Respondent's sales manager, became operations manager in January. Maury testified that he spoke with O'Neil about his attendance several times after January, because O'Neil's tardiness and no-show record was very poor. In early March he became particularly upset with O'Neil, and, during a discussion near the coffee machine, admonished him and told him

> that if he wasn't changing his attendance or the way he was doing business, that we will both have a very serious problem with him . . . that he had to change his attendance record. That he had to make efforts to get here on time. That if he didn't, you know, we would have to, basically, fire him. That's what I told him.

O'Neil acknowledged that Maury was "a little upset" with him on that occasion because an order had not gone out as a result of O'Neil's absence the day before. O'Neil decided to appease Maury by apologizing because, as O'Neil put it, "He's third down in the line from the top and you kind of try to make him happy."

March 15 was a payday, and on that day Dubuisson explained to the employees that due to an unavoidable problem all of the paychecks, including those of management, had not yet been prepared, and that they would receive their checks the following day. O'Neil stated, according to Dubuisson, that "if he didn't get his fucking paycheck, that he wasn't coming to work." O'Neil admits he did not show up for work or call in on the following day, March 16, because he had not been paid on March 15; however, he came to the warehouse at about noon on March 16 to pick up his check.

On March 17, when O'Neil returned to work, Warehouse Manager Dubuisson had a meeting with O'Neil and gave him the following written warning:

> After a recent meeting with Patrick Maury, Operations Manager, regarding your tardiness and current no show at work, we are forced to give you a *second warning* for not showing today March 16, 1999 at your work. Such behavior is not compatible with our company policy. Repeat absence or tardiness will lead to disciplinary action up to and including termination of employment.

The memo notes that O'Neil had been warned previously for a similar occurrence 1 week before, and under the hearing "Corrective Efforts" states: "No tardiness and/or no show on time at work."

O'Neil testified that during this meeting he told Dubuisson that he did not agree with the warning because he had not been paid on time, and Dubuisson said that "you can't just not come in, you know, like that." After discussion along these lines, according to O'Neil, Dubuisson handed him the notice and said, "you know, they don't want unions in the building."[7]

When asked by the General Counsel what time his shift began, O'Neil testified, "I can't really tell you that, I don't have a schedule. Like 9:00 'ish, 10:00 'ish, somewhere around there." And when specifically asked by the General Counsel whether he worked the 6 a.m. shift, he replied, "I did do that also, 6:00, 6:30, I don't—the times, I don't know."

[5] In fact, all of the warehouse employees worked hard during that period of time and because of this they received a $500 bonus and a dollar an hour wage increase.

[6] While Dubuisson checked four boxes under the hearing "Partially Meets Requirements," the items checked were not related to attendance and punctuality.

[7] I do not credit this statement of O'Neil. At that point in time there was no union in the picture, and such an incongruous remark would not make sense. In addition, O'Neil did not impress me as a credible witness. I find that Dubuisson credibly testified that he did not make such a statement and did not know anything about a union or union activity at the time..

Thereafter, according to Dubuisson, O'Neil continued to be absent or tardy on a consistent basis until the time of his discharge on May 7. Thus, Dubuisson testified:

> sometime he was calling in, sometime he wasn't calling in. Just like when he felt like calling he was calling; when he could call he was calling. And during that time, also, I believe he had a car, so I mean sometime he was calling me, said, I had a problem with my car. And don't know [sic] if he had a phone, or sometime he was saying, well, I don't have the money to be able to call. He wasn't calling, or when he wanted to call he called.

Dubuisson said there were complaints about O'Neil from other employees, apparently truckdrivers who would have to fill orders in O'Neil's absence so that they could leave on their routes on time. O'Neil did not request and was not given the opportunity to move back to the 9 a.m. shift, where his unpredictable attendance would cause less of a problem for the Respondent, because O'Neil had requested the early shift for his convenience in order to attend school,[8] and Dubuisson had accommodated him in this regard with the understanding that his attendance would be satisfactory. Further, knowing the personal schedules and commitments of the other warehouse employees, Dubuisson was certain that none of them would be willing to begin work at 6 a.m.

On Friday, May 7, just 3 days after the Union's request for recognition, Nollinger, Maury, and Dubuisson met with O'Neil and discharged him. They gave him a notice stating that, "After repeated warning, J. O'Neil is late to show at work on a regular basis—(see timecard)." The attached timecard shows that he clocked in 28 minutes late on Tuesday, May 4, and 38 minutes later on Thursday, May 6. Dubuisson testified that the fact that O'Neil had clocked out for some 13 minutes on Tuesday, May 4, between 9:08 and 9:21 a.m. and, with other employees, presented the recognition demand to the Respondent, did not enter in to the decision to discharge him. Dubuisson testified that O'Neil was discharged because "if you cannot do the job properly, then why stay, why keep an employee that's going to create problems that the person cannot fix . . . if you cannot do the job, why stay."

Maury testified that discussions about discharging O'Neil were "nothing new," that he and Dubuisson had such discussions all the time, and that on one or two prior occasions he had suggested to Dubuisson that O'Neil be discharged. But, according to Maury, during the 1998 holiday season O'Neil "was almost okay during that busiest time of the year." Further, it was difficult to train and familiarize new warehouse employees with the unusual inventory of imported French and European products, and therefore "we were very lenient to Joe." Since the beginning of the year, according to Maury,O'Neil's attitude, work performance, and attendance worsened, and were simply unsatisfactory. Maury and Dubuisson discussed this, warned O'Neil about these matters on many occasions, and finally, on May 7, decided that they would no longer tolerate his chronic tardiness.

c. Warning to Erik Cole

Erik Cole, a truckdriver, began working for Respondent on March 5. He was one of the employees who presented the Union's recognition request to Maury on May 4, and his name is listed as one of the 11 members of the Union's organizing committee in the Union's May 4 letter to the Respondent. He voluntarily quit his employment on June 1, within his 90-day probationary period. His hours of work as a truckdriver were from 6 a.m.[9] until 2 p.m. On May 7, he had a 15-minute meeting with Dubuisson, and received a document stating:

> —Review after 2 month [sic] of employment at MIF.
>
> —We are forced to give you *a written warning* following these mistakes done since your starting date in the Company on March 5th. (Emphasis in original.)
>
> April 7, 99—tardiness of 1 hr. April 9.99—delivery to wrong customer April 15.99
>
> —no delivery to customer-May 4th 99—came back from his route at 9.00—clock out at 9.09 for unknown reason to the Company and clock back in at 9.16 to go back on his route-May 5th 99—Tardiness 26 mn. Dropped wrong product to customer. Customer call to complain.
>
> *Corrective Effort*
>
> No more tardiness—Pay more attention on address to Customer and listed product on invoice.

Cole testified that Dubuisson gave him a copy of the warning, went over the document line by line, told him that his tardiness was inappropriate, and said that it was just a general performance review of his work, and that he needed to make more of an effort to be on time and focus on accuracy. He told Cole that he had no idea why he would clock out from his route in the middle of the day, and that this was a major concern, and "that you're not supposed to clock out in the middle of your route for any reason." This was the first time, according to Cole, that anyone from management had said anything negative about his clocking out on May 4 during his shift. However, on the morning of May 4, when he returned from his route to the warehouse, Maury asked him why he had returned to the facility. Cole told him there was going to be a union meeting, and Maury simply asked him whether he was going to finish his route. Cole said, "Yes."

Cole testified that on May 4, it took a total of 45 minutes for him to drive back to the warehouse from his route, clock out, clock back in, and return to the location of his next delivery. He agreed that it was common sense that driver should not take 45 minutes from his route to engage in non-company business, although at his discretion he would take breaks during his route to eat or make a rest stop. Cole testified that on April 7, the day he was an hour late for work, his route was split between two other drivers, and lead driver, Salim Zakkak, a unit employee,

[8] It appears from O'Neil's testimony that in fact he only attended school for a few days and then stopped going to school. Nevertheless, he did not advise the Respondent of this or request to be moved back to the 9 a.m. shift.

[9] Cole testified that he believed the warehouseman who was scheduled to come in at 6 a.m. was supposed to help the drivers by pulling the orders, as it was very busy in the morning and it was important that the deliveries be made on time.

spoke to him about his tardiness and assigned him to work in the warehouse that day. Cole further testified that he had been tardy on other occasions, and that on April 9, when he made a delivery to the wrong customer, Zakkak discussed the error with him and apparently told him that accurate deliveries were essential. Cole testified that he did, in fact, believe that Dubuisson's evaluation or warning was correct, that his tardiness was indeed a genuine problem, and that he did, in fact, need to improve.

Dubuisson said that he had spoken to Cole about some of these problems before he gave Cole the May 7 written review and warning, and that he issued it because Cole had made so many mistakes that Dubuisson felt it necessary to document and emphasize them so that Cole would understand that this was not acceptable and would try to improve; the alternative, according to Dubuisson, was to discharge Cole at the end of his 90-day probationary period for unacceptable work performance. Thus, he was not attempting to retaliate against Cole for his union activity, but was merely pointing out his mistakes so that he could apply himself more diligently and thereby retain his employment with the Respondent.

d. Locking of the warehouse gate; updating personnel files; giving periodic performance appraisals

A rolling scissors gate separates the warehouse area from the loading dock. The evidence shows that customarily, during business hours, the scissors gate may be shut but not locked, and that employees usually enter and exit the premises through this gate when they report to work, when they leave work, and when they take their breaks, either on the loading dock or in the adjacent parking lot. The timeclock is apparently just inside the warehouse gate.

Ivan Castro, a current warehouse employee, testified that when he got to work at noon on Tuesday, May 4, after the Union had presented its recognition request to the Respondent, the scissors gate had been locked and remained locked with a padlock on it "a majority of the day," except for the time it needed to be unlocked to receive deliveries. He recalled that the gate was also locked the following day when he came to work, and that he had to call for Dubuisson to open it so that he could punch in. The employees, according to Castro, were referring to this as a kind of "a lock down." It lasted just that week, and after Friday, May 7, according to Castro, "it kind of went back to normal," and "maybe occasionally" would the employees have to ask that the gate be opened for them to enter or leave. Thereafter, for the most part, employees could just walk in or out the gate and go outside on the dock or in the parking lot for their breaks. Other employees testified similarly. [10]

The Respondent's employee handbook has been in effect only since April 1998. Section 58 of the handbook, "Performance Appraisal (Review)," states that "Formal performance appraisals or reviews take place initially upon completion of the ninety (90) day probationary period and then at least once a year." Hughes de Vernou, the Respondent's sole owner, testified that the review periods set forth in the handbook are considered to establish general guidelines rather than precise dates for the periodic review of employees' performance, and it simply makes sense that the review should be approximately at the 90-day and 1-year anniversary dates. The Respondent is only 3 years old and has grown considerably in that period of time, and the Respondent's employment practices and procedures are evolving together with the Respondent's physical facility and its business operations. Thus, for example, there was no employee handbook in existence until April 1998, and prior to that time there were only about five or six employees; employees' work performance could be routinely monitored on a more informal basis; a handbook seemed unnecessary.

Daniel Nollinger, general manager, testified that the Respondent hired labor consultants Mike Thaw and Mike Zeiller on about May 21. These consultants were hired to conduct the Respondent's preelection campaign, as well as to review the Respondent's general employment practices. They suggested, among other things, that the Respondent begin putting the periodic performance reviews in writing on a regular basis. They also suggested that the Respondent's personnel files be updated so that they were complete, and that the Respondent should obtain I-9 INS forms from all employees, including managers and supervisors, where those forms were missing from the files, in order to be in compliance with INS requirements.

Written reviews were given to three employees in early June, prior to the election. The date of these reviews generally coincided with the employees' 90-day probationary period or anniversary date. Two employees received raises of $1 per hour and one received a raise of $1.50 per hour. The amount of these increases appears to be commensurate with periodic wage increases customarily given to employees and the wage rates in general.

Christie LaRussell, credit and account receivable manager and operations manager for the wine warehouse, testified that in late May or early June, Nollinger and one of the labor consultants asked her to review the personnel files of all employees, including sales employees, supervisors, managers, warehouse employees, and drivers. She was instructed to organize the files and determine if any necessary information was missing. She discovered that a variety of documents were missing from files, such as W-4 forms, I-9 forms, resumes, original employment applications, and other documents that should have been in the files. She determined what was missing, prepared a spreadsheet listing the names of the individuals, whether managers, supervisors, unit employees or nonunit employees, and the information missing from their files, and then attempted to obtain the information directly from the individuals and/or their supervisors. She did this either in person or by fax, simply advising them that she needed the information in order to update their files. As she gathered the information she noted this on the spreadsheet. Many employees did not have I-9 forms in their files. LaRussell testified that it was not until sometime in September that she went to de Vernou and asked him to verify and sign off on the current I-9 forms.

[10] While several employees testified similarly, they tended to enlarge upon the period of time the scissors gate was locked. I credit the testimony of Castro in this regard, and find that after May 7 the scissors gate was left unlocked and that employees' free ingress and egress was not thereafter hindered.

e. Administrative leave and discharge of Pam Nixon

Nixon began working for the Respondent on February 3 and was employed as warehouse clerk. She initially contacted the Union, solicited union authorization cards, accompanied the union representatives when they requested recognition on May 4, thereafter wore her union badge at work, and was an active union advocate. Her last day at work, prior to her illness and leave of absence, below, was on May 26. She had a prior career as a registered nurse, and then as warehouse manager for a different entity. Her availability for the position came to the Respondent's attention because the Respondent, in the process of purchasing the warehouse stock of Nixon's prior employer, had expanded to the point of needing a warehouse clerk. She helped set up the Respondent's warehouse, drove a forklift, and performed physical work, including the lifting of cases of wine that weighed up to 50 pounds. As a part of her job she went into all the warehouse areas on a daily basis.[11]

Karri Donahue, import manager, began working for the Respondent in October 1998. She supervised Nixon. Donahue testified that on May 6, she and other managers attended a "dual purpose" meeting with Nixon to discuss how the wine warehouse was to be run and also to discuss some deficiencies of Nixon: Nixon was told that her attendance was unacceptable, as her hours were from 8 a.m. to 5 p.m., Monday through Friday, and she had consistently been leaving work at about 4:30 p.m.[12] Further, she had not done certain work that she had agreed to do, such as leaving opened (broken) cases of wine in the warehouse, and that she should pay attention to pulling orders correctly. Nixon, according to Donahue, was very "compliant" and said that she understood. Donahue prepared a memorandum of the meeting dated May 6, entitled, "Pam Martin-Nixon—Wine Warehouse Clerk, Recap/Review of Job Responsibilities." The three-page memo lists 21 items or instructions that Nixon was required to follow, including the following: "Warehouse Clerk hours are from 8:00 a.m. to 5:00 p.m."; "The Warehouse Clerk must be available in the BVC inventory or shipping areas at all times during these hours"; and "At no time are loose bottles or "broken cases" to be in the warehouse. They are to be turned in immediately to the supervisor with a written explanation."

Donahue testified that a week after this May 6 meeting, she went out to the wine warehouse looking for Nixon because Donahue wanted her to ship some wine samples that evening. She was informed that Nixon had gone home for the day. The following day she and Christie LaRussell, credit and account receivable manager and operations manager for the wine warehouse, met with Nixon and once again informed her that it was unacceptable for her to be leaving work early, and that she was specifically being given a "verbal warning." Nixon was, according to Donahue, "very compliant as always." A written document dated May 12 and entitled "Employee Verbal Warning" was placed in Nixon's personnel file. The notice states, inter alia, that "Pam was given a verbal warning with reference to the Warehouse Clerk's assigned work schedule (hours of work). She was advised that her scheduled hours are: 8:00 am to 5:00 pm, Monday through Friday. She was also advised to take a one hour lunch break each day and that it is mandatory to clock 'in' and 'out.'"[13]

Dubuisson testified that he never advised Nixon that her hours were from 8 a.m. to 4:30 p.m. Rather, her hours were always from 8 a.m. to 5 p.m. However, Nixon's timecards show that during the overwhelming majority of her tenure with the Respondent she left work prior to 5 p.m. each day.

Nixon denied that she was given verbal warnings about attendance or anything else by anyone. While she was told what her new hours of work would be, this was simply because her hours of work were being changed as a result of a change in her responsibilities as warehouse clerk, and she did not regard this as a warning or reprimand for any work-related deficiencies. She did not know about the memorandum of the verbal warnings, as this had never been brought to her attention.

Nixon did not report to work on Monday, May 24 and Tuesday, May 25. She called in sick because of severe pelvic pain. As it turned out she was later diagnosed with an ovarian cyst. Nixon, formerly a registered nurse with a specialty in OB-GYN, had experienced a similar problem a year before, and testified that the nature of an ovarian cyst is that it is severely painful, and that nothing much can be done except to take medication to relieve the pain; then, when the cyst ruptures in a week or so, the pain is gone and the patient is fine.

She reported to work on Wednesday, May 26, and worked for about 3 hours before reporting to Karri Donahue that she believed she was suffering from an ovarian cyst, felt terrible, and was going home, and that as soon as it ruptured she would feel better and would return to work. Nixon testified that she came to work that day even though she was in pain because she needed the money. Further, she came back to work after 2 days because the Respondent's policy required a doctor's excuse after an absence of 3 days and she could not afford to see a doctor.[14] She received a phone call from Donahue that afternoon, who inquired about her health and advised her that she would have to see a doctor and would not be able to return without a doctor's excuse. Apparently she did not tell her that she could not afford to go to the doctor.

Nixon did go to her doctor on the morning of Thursday, May 27. She was given a pelvic exam and the doctor told her that she could return to work the following week if she was feeling better. Nixon testified that the doctor prescribed pain medication and told her, "If I was not feeling better to let her know, for me to basically be the judge of what I could physically do." She was given a note, signed by a medical assistant, that she could return to work on June 1, a Tuesday. The note contained the name Patricia Nixon, rather than Pam Nixon, the name on

[11] The Respondent's operations were divided into two distinct warehouse areas; one area, where expensive wines were stored, was fenced off from the other area where other products were stored.

[12] Donahue had spoken to Nixon previously about this, telling her that she should remain until 5 p.m. every day, and had also asked her several times to bring the broken cases of wine into the sample room.

[13] LaRussell corroborated the testimony of Donahue and testified that she prepared the memorandum of the verbal warning.

[14] At this time Nixon was not yet covered by the Respondent's health benefit insurance because certain paperwork had apparently not been completed in a timely fashion.

her employment application and the name she was called at work.

She returned to work on June 1, feeling better but still in a great deal of pain. She dropped off the doctor's excuse in Donahue's mailbox and went to her workstation. A short time later she was told to meet with Nollinger and de Vernou. Nollinger asked why she was working in the warehouse and had not officially punched in. She said that her timecard was not at the timeclock. They asked where her doctor's excuse was, obtained it from Donahue's mailbox, and looked at it. Nollinger asked her how she was feeling and remarked that Nixon did not look very well. Nixon, who was holding her side because of the pain, replied that she did not feel good "but needed to be there." Nollinger stated that he wanted her to go back to see her doctor, and immediately picked up the phone and called the doctor's medical clinic. He asked to make an appointment in the name of "Pamela" or "Pam" Nixon and was told that the clinic had no record of a patient by that name. Nixon told him to make the appointment in the name of Patricia Nixon, and an appointment was made for her for 10 a.m. that morning.

Nixon went to that appointment and was seen by a different physician in the same clinic.[15] She told that physician that she did perform physical work in a warehouse. He gave her an external exam and changed her medication. He told her to return to see him on June 3 if she had any pain at all, but released her to return to work on June 4 if she had no pain. He gave her a note, which was on a different form from the first note she had received from the medical assistant on June 1.

Nixon testified that she returned to work on Friday, June 4, feeling "wonderful," as by that time the cyst had ruptured. She presented her doctor's excuse to Dubuisson and he told her to wait. Then she was asked to meet with Maury and Philippe LeFour, sales manager.[16] Maury asked her how she was feeling and she replied "great" as she was no longer in pain. He said that he was very concerned about her health and wanted her to see another doctor, a specialist, who had reviewed her job description, and told her that she was being given paid administrative leave for 2 weeks so that she would not suffer any financial hardship. Maury said that he would try to get her an appointment by Monday, June 7, and that she could return to work after this. Nixon said that she had no transportation to go to a doctor who was not close to where she lived, and Maury said that she would be provided with or reimbursed for transpiration to and from the doctor. Nixon asked whether the leave of absence had anything to do with blocking her from voting in the election, and Maury said not at all, that she could come in and vote. She was given a leave of absence form, and asked to sign it, and she did so.

Maury testified that at about 8 a.m. on June 4 Nixon came in and presented him with a doctor's note. Nollinger, who was not present at the time, and was instructed by Nollinger to make sure that Nixon had an authentic note, had previously advised Maury of the situation before Maury permitted her to return to work. Nixon looked pale and uncomfortable to Maury; while she did not appear to be in pain, neither did she appear well enough to return to work. He observed that there was no letterhead on the doctor's note, and no printed doctor's name, but merely a scribbled signature, and testified that "it looked very generic to me, and it didn't look like a doctor's note, basically." He testified that "this whole thing looked bizarre to me," as he was aware that she had earlier returned with a doctor's note that "they found very suspicious, and this one looked really, really suspicious to me. So I didn't want her to get back to work without something that was proper."

Maury told her to wait and went to discuss the situation with the labor consultants who were at the facility that morning. He showed them the note, and they agreed that it seemed unacceptable. Further, Mike Thaw, one of the labor consultants, told him that Thaw had in fact called the doctor who had recently examined Nixon on June 1, and had verbally given that doctor a description of her job duties, and that that doctor had basically left it up to Nixon to come back to work if she felt well enough.[17] As a result of this discussion, it was agreed that Maury should put Nixon on a medical leave of absence for 2 weeks during which an appointment with a different doctor could be arranged.

Maury testified that regardless of whether or not Nixon had actually been to the doctor, he had no confidence in any doctor who would send someone back to work who was obviously ill and in no shape to return to work, as had occurred earlier on June 1. He testified, "I was suspicious about that doctor, bottom line, the guy sent her back to work. She was in pain. To me, that doctor is not a very good doctor. I was suspicious about that doctor. Big time." Maury testified that he was primarily concerned about Nixon's health and her ability to perform her duties requiring the lifting of heavy cases of wine, and that this, coupled with his lack of confidence in any doctors Nixon may have seen, caused him to require a second opinion by a different doctor.

Maury returned to Nixon, told her that he was concerned for her health and that he wanted her to see a different doctor, that the Respondent would pay for the visit, that she would be put on a medical leave of absence for up to 2 weeks, and that he would advise her of the time and date of the appointment. Nixon did not object. She did express a concern regarding her participation in the election, and Maury told her that she could participate in the election. She said that she had no transportation to get to the doctor's appointment, and Maury told her the Respondent would provide transportation for her. She said that she wanted this in writing, and Maury furnished her with a leave of absence form giving her 2 weeks of administrative leave, with pay, for a medical examination.

Nixon returned to the facility on June 7 and delivered a letter addressed to Maury protesting her leave of absence and stating, inter alia, as follows:

> Lastly, in response to your offer to find and make an appointment with a specialist for me, please do not do so.

[15] By this time it appears that Nixon's medical insurance had become effective.

[16] Apparently, Maury wanted LeFour's presence only as a witness, and LeFour did not participate in the discussion.

[17] In fact, there were several phone calls between Respondent's managers or representatives and Nixon's clinic or doctors.

> My temporary illness was not work related and is a purely private and confidential matter. If my personal physician believes it necessary for me to see a specialist, she will let me know.
>
> I remain ready, willing and able to return to work immediately.

Then she proceeded to the warehouse area, spoke with several employees, placed copies of this letter in the drivers' mailboxes, and was asked to leave the premises by Nolliger. She left the dock area and went into the parking lot where two union representatives were standing, and began talking with several employees, who were apparently on the loading dock.

Maury sent her a letter dated June 10 giving the reasons why the Respondent was requiring a second opinion before permitting Nixon to return to work. On June 11, Nixon acted as an observer for the Union and voted in the election. A few days later Maury telephoned Nixon and asked her if she had received the June 10 letter. She said, "No." He read the letter to her, told her that the doctor's appointment had been scheduled with Dr. Epstein for Thursday, June 17, at 11 a.m., gave her the details of the appointment, and advised her that she would be expected to see the doctor at the scheduled time. Maury testified that she became very upset and said she was not going.

Nixon did not go to see Dr. Epstein on June 17. Rather, she again went to her clinic and obtained another doctor's note stating that on June 4 she had been released for "full duty" with no work restrictions. She brought this note to the Respondent's facility on June 21 and, accompanied by Union Representative Pecker, spoke with Nollinger in the presence of Maury and others. Nollinger testified that he invited her into the office without the union representative, and she refused, so the discussion took place outside. He presented her with some papers, including an I-9 form, a W-4 form, and apparently the following memorandum.[18]

> Pursuant to our June 11th letter instructing you to complete a medical examination scheduled with Dr. Epstein, because you failed to show up you have effectively resigned your employment with Made In France.
>
> However, notwithstanding that fact Made In France will give you an additional time off without pay to complete another such job fitness examination with Dr. Epstein today, Monday June 21st at 10:30 AM in his offices located at (address) in order to obtain a release to return to work.
>
> Failure to see this physician as scheduled, and/or failure to timely present his certification of findings with respect to your fitness to perform your essential job functions will constitute an abandonment of your position and your employment relationship with Made in France will terminate.

Nixon, according to Nollinger, became very upset and said, "Oh, you f–king French people. You never listen to me. You're going to be so sorry that you fucked me up like that. What about having a doctor squeezing your balls." Nollinger, who was apparently concerned for his safety, yelled for someone in the office to call 911, and Nixon and Pecker left.[19] The following day Nollinger received a phone call from Nixon, who, according to Nollinger, simply asked for her final paycheck.[20] Nollinger understood this to mean that she was quitting, and said he would have her final paycheck prepared. Nollinger testified that if she had not quit he would have discharged her on June 22 for being insubordinate, for making a "racist" comment about her French employer, and for failing to see Dr. Epstein as scheduled.

LaRussell testified that it was on a Friday when she was asked to find a gynecologist and make an immediate appointment for Nixon. She understood that it was an important assignment. She began calling doctors on Monday, and went through a list of physicians furnished by the Respondent's workers compensation insurer. During this period of time she called about 10 doctors' offices, sometimes having to leave a message and wait for a response, while also performing a variety of regular duties in the course of her job, which she described as being "incredibly busy" and "very intense." She was able to find no doctor who would be willing to schedule an "immediate timely appointment" and, on Thursday afternoon, reported this to one of the consultants who was present at most times during the preelection campaign. The consultant told her that he would try to find a doctor, and she discontinued her search.

2. The Union's election objections

Ivan Castro, the current wine warehouseman, began working for the Respondent in October 1997. Castro testified that he worked on a shift beginning at noon, and was frequently late. No manager said anything to him about this, "because we don't really get busy till about 1:00 O'clock, 2:00 O'clock when the sales reps start calling in their orders. So, it wasn't major that I had to be there on time, as long as we got the job done, that was the main thing." However, on and after May 4, because of the union situation, he and the other employees had been told by the union representative to "cover their butts" and get to work on time. Thereafter, he was not late for work.

Castro testified that about a week prior to the election he and about three or four other employees requested a meeting with Respondent's owner, Hughes de Vernou, to apprise him of their concerns and let him know why they believed the Union had been contacted. One of the labor consultants was also present during the meeting. Castro was the primary spokesman. The employees told de Vernou that they wanted seniority to govern their advancement, that their periodic reviews were not timely, and that promotions should be given to current employees rather than to new employees hired from the outside to fill the

[18] The transcript reflects that Nollinger handed Nixon GC Exh. 46, but it appears that Nollinger handed her GC Exh. 47, the memorandum set forth herein.

[19] Nixon testified that, "I wouldn't have hurt him," but was so upset that she "fired off" on Nollinger and did make such a statement about him seeing a gynecologist "and pull his shorts down and let him tweak his nuts together instead of me going," and basically telling him to "f–k off."

[20] Nixon testified that she called Nollinger and told him that "[A]pparently you have fired me, and I would like my paycheck." And Nollinger replied, "no problem."

higher paying positions of responsibility. De Vernou listened and, according to Castro, said that "the things that he could fix he would, but the things that he can't, because of the unlawful things or whatever, violating the laws, he would [sic] [not], but it was basically he heard us out and he wanted, you know, he wanted to hear where we were coming from." When asked whether this conversation took place before the posting of the job for the lead route driver position, below, Castro testified, "I believe so."

De Vernou testified that this conversation, in early June, was initiated by the employees who seemed to be disenchanted with the Union and wanted to speak with him about their concerns. About six employees were present at this meeting, which lasted about 15 minutes. According to de Vernou, the employees did not point out any specific problems, but were concerned about being able to communicate directly with him. He mainly just listened to them, and told them that since they were now in the middle of an election campaign, he could not do anything more than listen to their concerns.

On June 3, the Respondent posted a notice for a position titled "Lead Route Driver," with a wage range between $15 and $18 per hour. This is the first time a job had been posted for bid. The notice sets forth the job responsibilities, together with a list of necessary skills and abilities needed to perform the job, and states, "All employees interested in being considered for this position please sign below." Two employees, Wilfredo Hernandez and Rolando Rostran, signed the notice form.

On June 4, the Respondent posted a notice to all employees announcing a personnel change, namely, that the former lead route driver, Salim Zakkak, had transferred to a different position. The notice sets forth the nature of his new job responsibilities, and goes onto state that the lead route driver position "is open and available," that a job bid sheet has been posted in the warehouse for all employees to review, that any employee interested in being considered for the job is encouraged to sign the bid sheet, and that all candidates will be interviewed and the most suitable candidate will be selected.

Nollinger testified that he interviewed the two candidates for the position on June 8, and delayed announcing the decision until Monday, June 14, for the following reasons: The election was to be held on June 11, and he did not want the decision to perhaps influence the vote of either candidate; he had not had a chance to first meet with the employee who would not be awarded the job to personally advise him of this; and he, he had not yet had a chance to talk with Maury and Dubuisson about his selection for the position.

Castro testified that after the election, on about June 21, the Respondent posted a signup notice in the lunchroom for two available warehouse positions. Castro and two other employees applied for the positions, and Castro was awarded one of the positions.[21]

Castro testified that there were a number of group and individual meetings with the labor consultants hired by the Respondent during the preelection campaign. During one such group meeting the consultants presented a scenario regarding the election and negotiation process and in this context mentioned, among the things, "bargaining from scratch," and "impasse," and "you could just start from zero and have a wage decrease," and that in the event of a strike, employees could be "permanently replaced." However, a statement about such matters, apparently taken by the Respondent, states as follows:

> During the election period, we attended employee meetings. One particular meeting was about negotiations. The consultants told how both sides come to the bargaining table to exchange proposals, nothing had to be agreed to by either side, and that during bargaining you could eventually reach impasse. During the meeting I did not hear the consultant say anything about bargaining from scratch. We were also shown a video, it was role play about both sides in bargaining session. I remember that I thought it was bad acting. After the video we were given a handout, the handout said bargaining was like a roll of the dice, bargaining was a gamble.

Later, during his testimony in this proceeding, Castro stated that he didn't know whether the consultants used the term "bargaining from scratch," but they did say that "we can take a pay cut"[22] as a result of bargaining.

C. Analysis and Conclusions

I find that on the morning of May 4, shortly after the Union presented its request for recognition, the Respondent locked the warehouse scissors gate. Clearly this was in response to the Union's recognition request. While the record evidence suggests that the Respondent was concerned that union representatives may come on to the dock or into the warehouse, there is no evidence that this occurred, or that the Respondent advised the employees that this was its rationale for locking the gate. The locking of the gate for the next 3 days did inhibit the employees' ingress and egress, so that it was necessary for them to have someone unlock the gate when they wanted to take their breaks on the loading dock, and make food purchases from the convenience truck and/or talk with the union representatives in the parking lot during their breaks. As this immediate reaction to the recognition request could have been reasonably understood as an attempt by the Respondent to limit or monitor employees' discussions with one another or with union representatives, I find that for a period of 3 or 4 days the locking of the gate did have a tendency to inhibit and interfere with their union activity, and is therefore violative of Section 8(a)(1) of the Act.

Clearly the Respondent was dissatisfied with O'Neil's work performance, and had given him verbal warnings and one written warning. The record evidence abundantly shows that the Respondent tolerated O'Neil's absenteeism, tardiness, and other work-related deficiencies for an extended period of time, apparently because he was at least a satisfactory worker and was familiar with the inventory, and, because of the difficulty in hiring and training new warehouse employees. Nevertheless, he was discharged on May 7, 3 days after accompanying the union representatives when they made their recognition demand, during which occasion O'Neil specifically advised Op-

[21] The posting of these positions for bid is not at issue here.

[22] The transcript, at p. 1388, LL. 11–12, is corrected to read "we can take a pay cut."

erations Manager Maury that if Maury had anything to say to him he could say it to the union representatives, who would be his spokesmen.[23]

It is significant that both the verbal and written warnings given to O'Neil by Maury and Dubuisson approximately on March 7 and on March 15, respectively, were for specific incidents: on the first occasion an order did not get filled or was delayed because of his tardiness, and on the second occasion he deliberately did not show up for work because of his pique at not receiving his paycheck on time. Thus, neither of these warnings was for tardiness alone.[24] Thereafter, insofar as the record shows, O'Neil continued to be chronically late until his discharge on May 7, some 7 weeks later. The record evidence shows that O'Neil was simply incapable of being consistently on time, and that the Respondent understood this and tolerated it throughout O'Neil's 1-year period of employment, including the 7-week time period between his formal written warning and his discharge. Further, on May 4 and 6, when O'Neil was approximately 28 and 38 minutes late, respectively, his tardiness on these days did not result in any particular problems affecting the Respondent's operations such as, for example, causing the trucks to be delayed or orders to go unfilled. He was simply tardy as usual and, as noted, his tardiness alone seemed to be something that the Respondent had simply been willing to tolerate up to that point for a variety of reasons set forth above. It was not until he became a union supporter that the Respondent decided that his tardiness was no longer acceptable. Under these circumstances, as the General Counsel has presented a strong prima facie case, I conclude that the Respondent has not satisfied its burden of proof under *Wright Line*[25] by demonstrating that O'Neil would have been discharged on May 7 for legitimate business considerations unrelated to his union activity. I therefore conclude and find that the discharge of O'Neil was violative of Section 8(a)(3) of the Act as alleged.

I am mindful of the fact that the written warning to Erik Cole was given to him on May 7, the same day that O'Neil was unlawfully terminated. Nevertheless, I credit the testimony of Dubuisson that he was concerned with Cole's work performance and wanted to insure that Cole was specifically made aware of these deficiencies so that he could complete his probationary period and continue working for the Respondent thereafter. Moreover, Cole stated that he believed the warning was valid criticism of his work performance to that date, and did not indicate that any of the items specified in the warning were unjustified. I find that the warning to Cole was not discriminatorily motivated, and shall dismiss this allegation of the complaint.

I find that the updating of employees' personnel files, including the files of managers, supervisors and unit and non-unit employees, was motivated by lawful business considerations. All personnel files that were missing necessary information were updated with current information, and the unit employees were not singled out. The fact that the Respondent's labor consultants made this suggestion is, under the circumstances, certainly not determinative, particularly as their services were utilized for more than simply conducting the Respondent's preelection campaign. The record evidence abundantly shows that the Respondent's business operations had been in a state of flux, including rapid expansion both in warehouse space and in employee complement, and that its record keeping and personnel practices were haphazard. Indeed, even its timecards were frequently incomprehensible and contained errors, including incorrect days and even months. Under these circumstances, I find the fact that some Hispanic employees were asked to complete new I-9 forms and perhaps other forms for the specified purpose of updating or completing their personnel files was not discriminatorily motivated. I shall dismiss this allegation of the complaint.

Similarly, I find that the three written performance appraisals, together with accompanying wage increases, were not given to the employees for the purpose of influencing their vote in the upcoming election. The performance appraisals were due at about the time they were given,[26] the wage increases were commensurate with wage increases customarily granted by the Respondent, there was not a long history of giving appraisals that could be construed as a "standard practice," and, as noted above, the Respondent, with a recently expanded operation, was attempting to modify its business practices and record keeping commensurate with a larger and more efficient organization. I shall dismiss this allegation of the complaint.

Regarding the verbal warnings given to Nixon on May 6 and 12, I credit the convincing testimony of Managers LaRussell and Donahue and conclude that they did indeed specifically tell Nixon that she was being verbally warned for failure to adhere to certain job and attendance requirements. While the record shows that for the most part Nixon customarily left work early, nevertheless, I find that she was supposed to remain at work in the event she was needed late in the day for some specific purpose, and, as such occasions were infrequent, her whereabouts were not regularly monitored. Accordingly, I find that the verbal warnings to Nixon were motivated by legitimate concerns rather than by unlawful considerations, as alleged. I shall dismiss this allegation of the complaint.

Despite the fact that her doctor told her not to go back to work if she was still experiencing pain resulting from an ovarian cyst, Nixon attempted to return to work from her illness two times prior to June 4. On both occasions she was admittedly in pain and in no shape to go back to work, and only wanted to return to work because she needed the income. Thus, she did

[23] The Respondent does not appear to maintain that this statement was tantamount to insubordination because O'Neil was, in effect, stating that he would no longer speak with the Respondent's supervisors about work-related matters such as absenteeism or tardiness.

[24] I find that both the verbal and written warnings given to O'Neil were not motivated by unlawful considerations, as alleged; clearly, these warnings were motivated by legitimate business considerations, and I have previously discredited O'Neil's testimony linking the March 15 warning with any alleged union activity.

[25] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[26] There is a significant dispute, which need not be resolved, regarding whether one of the annual appraisals was given approximately 2 weeks early, depending on the actual hire date of the employee.

not follow her doctor's advice. I credit Maury's testimony that early on the morning of June 4, when Nixon attempted to return to work for the third time, she looked pale and uncomfortable and not well enough to return to work, that the doctor's note she provided him did not appear to be authentic, and that during a discussion with the labor consultant about the situation Maury was advised that Nixon's doctors seemed to be leaving it up to Nixon to self-diagnose her illness and decide when to return to work. Under these circumstances, as an immediate decision had to be made and Nixon had previously demonstrated that she could not be trusted to return to work only when she had no further pain, I believe that Maury's decision to grant Nixon a paid leave of absence until she could be examined by a specialist was eminently reasonable. Thus, her work was quite physical and included the manual lifting of heavy cases of wine, the driving of a forklift, and other duties, and Maury was attempting to assure himself, on behalf of the Respondent, that Nixon would not compromise her own health and safety or the safety of coworkers upon her return to work.

I find that the Respondent attempted to be diligent in scheduling another appointment for Nixon, and that the time lapse in contacting and scheduling an appointment with a different physician was not contrived or deliberately prolonged in order to keep Nixon away from the premises until after the election. And while Nixon was not permitted to remain on Respondent's premises during the leave of absence, as there was no work-related reason for her to be there, she was not precluded from engaging in union activity off the premises, and understood that she could have regularly met with the employees before and after work and during break times in the parking lot as she elected to do on one occasion. Further, I also find that requiring Nixon to get a second opinion from another physician was not designed to cause her to quit rather than to undergo the discomfort or embarrassment of a pelvic exam, as it was not at all certain that the physician selected by the Respondent would deem an internal exam to be necessary; and, in any event, Nixon was fully aware that she could refuse to undergo such an exam. Nixon refused to see the physician selected by the Respondent because she believed, as she stated in her letter to Maury, that "My temporary illness was not work related and is a purely private and confidential matter," and that the Respondent had no business second-guessing her own physician. However, while any illness is certainly a "private and confidential" matter, the extent of Nixon's recovery from her illness was indeed work related as the Respondent wanted to satisfy itself that she was well and capable of performing her duties.

I conclude and find that the Respondent has met its burden under *Wright Line*.[27] Thus, it has demonstrated that its decision to require Nixon to be examined by a different physician was based on legitimate concerns and was not unlawfully motivated, that Nixon's refusal to meet with the physician was unreasonable and, under the circumstances, insubordinate, and that, as Nollinger credibly testified, Nixon thereafter elected to resign her employment rather than to comply with the Respondent's request. Accordingly, I shall dismiss this allegation of the complaint.

[27] Supra.

As noted above, the Union's election objections include the foregoing unfair labor practice allegations. In addition, the Union maintains that the bidding procedure for the position of a new lead driver constitutes objectionable conduct for three reasons, namely, the bidding procedure was unprecedented, it included the promise of a wage increase, and the Respondent deferred the awarding of the position until after the election.[28]

While it appears that the Respondent could have waited until after the election to post the bidding notice, there is no requirement that an employer modify its business practices during an election campaign. Unlike the situation regarding the Respondent's hiring of Nixon, an experienced warehouse manager, from the outside because it believed no other current employees were qualified for such a warehouse job, the Respondent knew that it had current drivers who were viable candidates for the position of lead driver. It is certainly not unusual for employers to utilize a bidding procedure where it is believed that more than one qualified employee might be seeking a particular job. The notice was posted at the same time as the announcement of the fact that the current lead driver was assuming or had assumed another position and this happened to occur about a week before the election. Regarding the announced wage range for the job, employees would necessarily understand that being promoted to the position of lead driver would clearly include a wage increase of some sort, and the announced wage range for the position was in line with the wages received by the former lead driver. Finally, as there were additional business-related reasons for deferring the awarding of the promotion for 3 business days until after the election, I find that the Respondent would have delayed the announcement in any event. Under the circumstances, I conclude that this election objection is without merit and should be overruled.[29]

I do not credit the testimony of employee Ivan Castro that during one of the Respondent's preelection employee meetings the labor consultants stated that bargaining would begin from scratch. No other employees testified that this remark was made at any of the meetings, and Castro was admittedly unsure of his testimony in this respect. I recommend that this election objection be overruled.

Having found that O'Neil's discharge was violative of the Act and that the Respondent unlawfully locked its warehouse gate for only a few days,[30] I further conclude and find that such conduct is not so extensive and pervasive as to preclude the conducting of a second election and to warrant a *Gissel*[31] bargaining order.[32] However, as O'Neil's unlawful discharge occurred on May 7, the same day as the Union filed its election petition, and as the Union's election objections incorporate this complaint allegation, I conclude and shall recommend that this is sufficient to warrant the setting aside of the first election and the conducting of a second election.

[28] This is not alleged in the complaint as being violative of the Act.

[29] Cf. *Wal-Mart Stores*, 325 NLRB 124, 134–135 (1997).

[30] Had the locking of the gate been the only violation found, I would find it to be de minimus and insufficient to warrant a remedial order.

[31] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[32] See, for example, the Board's analysis in *DTR Industries*, 311 NLRB 833, 845–847 (1993).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act only as set forth here.

4. Respondent's unfair labor practices found here warrant the setting aside of the election.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employee Joseph O'Neil who, it has been found, was unlawfully terminated on about May 7, 1999, immediate and full reinstatement to his former position of employment and make him whole for any loss of wages or benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, having found that O'Neil was unlawfully discharged on the same day as the filing date of the petition for election, I recommend that the Union's election objection in this regard be found to be meritorious and that a second election be conducted. In addition, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix."

[Recommended Order omitted from publication.]